

In the Compensation of
Carlos S. Gelin, Claimant
Contested Case No: 05-010H
PROPOSED & FINAL ORDER

July 2, 2008

CARLOS S. GELIN, Petitioner
Fidelity & Guaranty Ins. Co., Respondent
Before Robert Pardington, Administrative Law Judge

Pursuant to notice, a hearing convened in above-captioned matter on May 7, 2008, in Portland, Oregon, before Administrative Law Judge Robert Pardington. Claimant was present and represented by attorney Scott McNutt, Jr. The employer, Steiner Corp., and its insurer, GAB Robins N.A., were represented by attorney Tom Huynh. The certified Creole language interpreter was Yves Auguste.

The hearing was continued for the submission of written closing arguments. The record closed on receipt of claimant's counsel's June 9, 2008 letter, waiving reply argument.

Exhibits 1 through 82 were admitted.

ISSUE

Compensability of medical services (palliative care with Dr. Piegrass). Claimant appeals the January 14, 2005 Administrative Order. (Ex. 70). The case has been referred to the Hearings Division by the Director.

FINDINGS OF FACT

Making new or supplemental "findings of fact" is not appropriate with a "substantial evidence" standard of review. ORS 656.327(2). *See Liberty Northwest Insurance Corp. v. Kraft*, 205 Or App 59, 62-3 (2006).

I adopt the Findings of Fact from the January 14, 2005 Administrative Order as supported by substantial evidence. (Ex. 70).

CONCLUSIONS OF LAW AND OPINION

The Director's order may be modified at hearing only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2).

In the January 14, 2005 Administrative Order, the Director found that the medical services prescribed by claimant's attending physician, Dr. Piegrass, were "palliative," and that claimant was neither employed nor enrolled in a vocational training program, and was therefore not eligible for palliative care. (Ex. 70-2). *See* ORS 656.245(1)(c)(J).

Claimant contends that he was and is, in fact, in the “work force,” citing a 2004 “W-2” earnings summary from Sealy, Inc., and his testimony at hearing. (*See Ex. 75-3; Cl. Testimony*).

Nevertheless, as explained above, I may not make supplemental Findings of Fact, outside of the record available to the Director prior to the January 14, 2005 Administrative Order. *Kraft*, 205 Or App at 62-63. The “W2s” were submitted by claimant on February 3, 2005, after the issuance of the January 14, 2005 Administrative Order. (*See Exs. 70, 75*). Claimant’s testimony that he is currently working, driving a truck for “Road Runner,” is also outside of the record that was before the Director.

If claimant believes that his circumstances have changed in relation to the necessity of the palliative care to enable him to “continue current employment” (*see* ORS 656.245(1)(c)(J)), the appropriate course of action would seem to be for claimant’s attending physician to resubmit a request for palliative care to the insurer, as the Administrative Order suggested. (*See Ex. 70-2*).

Claimant also raises the issue of whether the disputed medical services are “palliative,” but does not disagree with the Director’s finding that they are, in fact, palliative. (*Ex. 70-2*). ORS 656.245(1)(c)(J).

The January 14, 2005 Administrative Order is supported by substantial evidence and does not reflect an error of law, and is therefore affirmed. Inasmuch as claimant has not finally prevailed in this matter, an attorney fee under ORS 656.385(1) is not awardable.

IT IS SO ORDERED.